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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANCISCO MENDEZ-VILLARREAL
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To
The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether jury instructions affecting the Government's burden of proof beyond a reasonable doubt should be treated as plain error.

II.

Whether a definitional instruction on proof beyond a reasonable doubt which deviated from the Fifth Circuit pattern instruction was erroneous.

III.

Whether a jury instruction that the jurors' duty was to "seek the truth" tended to undercut the proper assignment of the burden of proof.

LIST OF ALL PARTIES

1. Francisco Mendez-Villarreal, Defendant-Petitioner.

2. The United States of America, Plaintiff-Respondent.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW FRANCISCO MENDEZ-VILLARREAL, Petitioner herein, by and through his attorney, **Mike DeGeurin**, and pursuant to Rule 12, files this petition for writ of certiorari and in support thereof, would show the court as follows:

LOWER COURT'S OPINION

The opinion of the Court of appeals for the Fifth Circuit was not designated for publication. The full text of the opinion is reproduced in the Appendix.

BASIS FOR JURISDICTION

A. The opinion of the Court of Appeals was delivered on August 17, 1993. The judgment of the Court of Appeals issued the same date.

B. No motion for rehearing was filed.

C. Petitioner asks this Court to review a final judgment of a court of appeals of the United States. Therefore this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

D. This petition is timely if filed on or before November 15, 1993.

CONSTITUTIONAL PROVISIONS RELIED UPON

The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, ***nor be deprived of life, liberty, or property without due process of law***; nor shall private property be taken for public use, without just compensation (emphasis added).

The Sixth Amendment to the United States Constitution reads:

> In all criminal prosecutions, ***the accused shall enjoy the right to a speedy and public trial, by an impartial jury*** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence (emphasis added).

STATEMENT OF THE CASE

The petitioner was indicted in the United States District Court for the Southern District of Texas for Possession with Intent to Distribute Marijuana, in violation of 21 U.S.C. §841, and Conspiracy to Possess with Intent to Distribute Marijuana, in violation of 21 U.S.C. §846 (R.-1-2).[1] Evidence presented to a jury showed that a Refugio County, Texas deputy sheriff, Juan Hernandez, Jr. learned that Renato Garza-Saenz needed a driver to bring a load of marijuana from Mexico to Houston, Texas. Deputy Hernandez posed as a person willing to transport contraband and met with Garza-Saenz. It was arranged for Hernandez and another man to drive a truck containing marijuana to a truck stop southwest of Houston. There Hernandez was met by Garza-Saenz and the petitioner, who arrived in the petitioner's automobile. Hernandez and Garza-Saenz (but not the

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[1] The record of court documents is designated herein by "R." and a page number. The court reporter's transcription is designated by "T." for the trial and "T. Sent." for the sentencing hearing, followed by page numbers.

petitioner) entered a restroom and reached an agreement to exchange the marijuana for money at that location, but the arrangement was aborted when it appeared that a cashier may have been calling the police. After some telephone negotiations between Hernandez and a superior of Garza-Saenz, it was agreed that the exchange would take place at a nearby highway rest stop. Hernandez, Garza-Saenz, and the petitioner were in the process of making the exchange when other officers arrived to arrest Garza-Saenz and the petitioner. The petitioner testified that he accompanied Garza-Saenz and lent the use of his automobile to the enterprise after Garza-Saenz indicated he wanted to obtain some "hot" merchandise, which the petitioner took to mean stolen goods, not narcotics.

Both parties requested that the court's charge to the jury include the definition of proof beyond a reasonable doubt found in the Fifth Circuit's pattern jury charges (R.-56, 70, 72). The instruction found in U.S. Fifth Circuit District Judges Association, **Pattern Jury Instructions, Criminal Cases**, §1.06 (hereinafter abbreviated "Pattern Instructions §1.06") provides the following definition:

> A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

Instead the trial court instructed as follows:

> Proof beyond a reasonable doubt is proof that is so convincing to you that you would be willing ***to have other people rely and act***

> ***upon it without hesitation*** in the most important of your own affairs (emphasis added).

The petitioner did not articulate an objection to this alteration during the jury trial.

While not following the pattern charge on proof beyond a reasonable doubt, the trial court did submit the pattern instruction found in U.S. Fifth Circuit District Judges Association, **Pattern Jury Instructions, Criminal Cases**, §1.25 (hereinafter abbreviated "Pattern Instructions §1.25"), which stated in part:

> Your only interest is to seek the truth from the evidence in the case.

This also drew no objection at trial.

The jury found the petitioner guilty on both counts. The trial court assessed punishment at confinement for sixty months. New counsel for the petitioner did raise the issue of the deviation from Pattern Instruction §1.06 during the sentencing hearing, at which time the trial judge indicated his belief that he was improving on the pattern charge. The petitioner's new counsel also contested the propriety of the "seek the truth" instruction at the sentencing hearing. Both of these jury charge issues were raised on appeal to the Fifth Circuit. Due to the lack of objections during the jury trial, a panel of the Fifth Circuit analyzed both of these issues under a "plain error" standard. The Court of Appeals panel concluded, in an unpublished opinion delivered on August 17, 1993, that neither of these facets of the charge constituted plain error.

THE FEDERAL COURT JURISDICTION

The United States District Court had jurisdiction over the indictment, which accused the petitioner, in two counts, of violating 21 U.S.C. §§841 and 846. The Court of Appeals had jurisdiction under 28 U. S. C. §1291 and Fed.R.App.P. 4(b).

REASONS FOR REVIEW

The Fifth Circuit's decision to analyze the issues here under a plain error approach, pursuant to Fed.R.Crim.P. 52(b), raises the important question of whether incorrect instructions defining proof beyond a reasonable doubt constitute plain error. The petitioner also thinks a plain error approach was inappropriate as to the matter of the defining instruction, in that the petitioner did submit a written request for the language of Pattern Instructions §1.06. That ought to be sufficient. Even if the plain error approach is appropriate here (and it indeed is necessary as to Question III), such charge errors fall within one of the areas which this Court declined to explore in the recent decision in ***United States v. Olano***, ___ U.S. __, 113 S.Ct. 1770, 1778, __ L.Ed.2d __ (1993), i.e. "those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." As to the definitional instruction, the Fifth Circuit's decision here appears to conflict with the decision of the First Circuit in ***United States v. Colon-Pagan***, 1 F.3d 80 (1st Cir. 1993), decided three days after the decision in this cause, as to whether there was plain error. Similarly, the erosive effect of the "seek the truth" instruction on the Government's burden of proof and the presumption of innocence falls into the category of errors where any assessment of effect on the jury would be speculative, but prejudice should be presumed because the principles which are jeopardized are so important.

Apart from the question of the appropriate standard of review, this cause also presents two important questions which share a common theme: the effect of a trial court's instructions on a jury's understanding of the Government's burden of proving guilt beyond a reasonable doubt. No principles of criminal jurisprudence are more important than the assignment of the burden of proof upon the Government and the application of the most demanding standard for satisfaction of that burden, i.e. proof beyond a reasonable doubt. These related concepts are part of the due process of law which is guaranteed in a federal criminal trial by U.S. CONST. amend. V, and this Court recently held that they also are critical components of the right to trial by jury guaranteed by U.S. CONST. amend. VI. ***Sullivan v. Louisiana***, __ U.S. __, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). In light of the importance of these bedrock doctrines, the petitioner submits that the Court of Appeals erred in its application of the plain error doctrine here.

A. REASONS FOR REVIEW OF QUESTION ONE: APPLICATION OF THE PLAIN ERROR STANDARD

The Court of Appeals analyzed both of the charge issues under the plain error provision of Fed.R.Crim.P. 52(b), which states:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The petitioner first submits that this was inappropriate as to the definition of "proof beyond a reasonable doubt." The petitioner did submit a written request for the definition found in Pattern Instructions §1.06. The question is whether a written request adequately complies with the pertinent language of Fed.R.Crim.P. 30:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

At least two circuits have held that submission of a requested instruction is insufficient to satisfy Rule 30. ***United States v. Cheek***, 3 F.3d 1057, 1061 (7th Cir. 1993); ***United States v. Hecht***, 705 F.2d 976 (8th Cir. 1983). Some other circuits have reached the ambiguous conclusion that error was not preserved where there was neither an objection nor a requested instruction, as in ***United States v. Hines***, 955 F.2d 1449, 1453 (11th Cir. 1992).[2] The same ambiguity as to the adequacy of a request alone appears in *Lopez v. United States*, 373 U.S. 427, 436 (1936), where this Court found that error was waived because "no request for such an instruction was made, and there was no objection to the instruction given." *United States v. Park*, 421 U.S. 658, 676 (1975) similarly relied on the lack of a request, which was not a clear holding that a request suffices. This Court has not resolved this important procedural question, but it should.

As previously indicated, the issue in Question III can only be addressed under the plain error standard, so the petitioner further urges this Court to find that the Court of Appeals erred in its application of the plain error standard to both Question II and Question III. The explanations of this standard have been somewhat vague and protean over the years, but this Court recently provided some clarification of the principle in ***Olano***, *supra*. The Court did that by setting

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[2] In Texas state courts a requested instruction would preserve error. Tex. Code Crim. Proc. art. 36.15.

forth three limitations on appellate authority under Rule 52(b):

> The first limitation on appellate authority under Rule 52(b) is that there indeed be "error." Deviation from a legal rule is "error" unless the rule has been waived. 113 S.Ct., at 1777.
>
> ...
>
> The second limitation on appellate authority under Rule 52(b) is that the error be "plain." "Plain" is synonymous with "clear" or, equivalently, "obvious." 113 S.Ct., at 1777.
>
> ...
>
> The third and final limitation on appellate authority under Rule 52(b) is that the plain error "affec[t] substantial rights." This is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings. 113 S.Ct., at 1777-1778.

This Court did not say that error must "determine" the outcome, only that it "affected" it. As noted already, ***Olano*** also recognized that there can be categories of error where prejudice should be presumed. ***Id.*** at 1778.

How do the ***Olano*** criteria apply here?[3] First, whether or not error occurred is the topic of the other two questions presented. For the moment the petitioner submits that each of the challenged portions of the charge constituted error. This Court ought to grant the writ of certiorari if it agrees as to either of the alleged errors.

Second, the errors were sufficiently "plain" or obvious. The petitioner requested a different instruction on reasonable doubt in writing. The trial judge and the prosecution could have and should have noticed the problem even without prompting by the defense. The trial judge's explanation at the sentencing hearing showed that the trial judge clearly understood that he was deviating from the pattern instruction which the petitioner and the Government both desired (as indicated by the instruction requests from both parties). The trial judge simply believed he was improving upon the pattern instruction. While the problem with the "seek the truth" instruction was perhaps more obscure, the trial judge readily acknowledged his understanding of the petitioner's concerns when the matter was raised at the sentencing hearing.[4]

Third, the petitioner submits that ***Colon-Pagan***, *supra* was correct, and the Fifth Circuit's opinion in this cause was

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[3] ***Olano*** was decided after the petitioner's brief was filed in this cause. The Fifth Circuit decided this cause summarily without oral argument, so there was no occasion for a specific discussion below as to how ***Olano*** applied here.

[4] It is to the trial judge's credit that he is an independent and creative thinker and was able to understand the sources of disagreement. Given that the trial judge here was not really in the dark as to the issues, this is not a case where an appellant is simply trying to "blindside" the trial court.

incorrect, as to whether a erroneous instruction on reasonable doubt "affects substantial rights." ***Colon-Pagan, supra*** at 82, drew upon ***Sullivan***, 113 S.Ct. at 2082, which found that a defective "reasonable doubt" instruction "constitutes a structural defect in the constitution of the trial mechanism." ***Colon-Pagan*** further noted that this Court held in ***Arizona v. Fulminante***, __ U.S. __, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991) that such a "structural defect" prevents a trial from "reliably serv[ing] its function as a vehicle for determination of guilt or innocence." The petitioner further submits that the "seek the truth" instruction is a similar "structural defect" which adversely affects the proper allocation of the burden of proof, and the error in submitting that instruction also should be characterized as affecting substantial rights.

B. REASONS FOR REVIEW OF QUESTION II: THE "REASONABLE DOUBT" INSTRUCTION

The reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." ***Cage v. Louisiana***, 498 U.S. 39 (1990), citing ***In re Winship***, 397 U.S. 358, 363 (1970). Yet there is probably no more important issue on which the lower courts' jurisprudence is in such conflict and disarray. The jurisprudence is inconsistent as to whether any instruction proving a definition should be given, and even where courts have approved of such efforts, there is substantial disagreement as to what definition is appropriate.

The Fifth Circuit has adopted a pattern instruction. So have the Sixth Circuit, the Eighth Circuit, the Ninth Circuit, and the Eleventh Circuit. The Sixth Circuit pattern definition is similar to the Fifth Circuit's definition, and the Eleventh Circuit adopted the Fifth Circuit language. The Ninth Circuit has taken a different approach and specifically

rejected the Fifth Circuit's language. *See* Manual of Model Criminal Jury Instructions for the Ninth Circuit, §3.03 (Comment). At least one other circuit has held that the Fifth Circuit pattern instruction should not be given. ***United States v. Noone***, 913 F.2d 20, 29 (1st Cir. 1989). Yet the First Circuit is not troubled by a similar instruction couched in terms of the hypothetical "reasonable man." The Seventh Circuit has adopted pattern instructions but declined to do so for "reasonable doubt." Federal Criminal Jury Instructions of the Seventh Circuit (1980) §2.07 states that "the phrase 'reasonable doubt' is self-explanatory and is its own best definition." The Fourth Circuit, which traditionally condemned reasonable doubt instructions, ***United States v. Moss***, 756 F.2d 329, 333 (4th Cir. 1985), recently adopted what might be called an "off the menu" approach: an instruction is given if the jurors ask for it. ***United States v. Adkins***, 937 F.2d 947, 950 (4th Cir. 1991).

In ***Holland v. United States***, 348 U.S. 121, 140 (1954), this Court cautioned against judicial attempts to define proof beyond a reasonable doubt in the charge, but the decision in ***Holland*** had the unintended effect of promoting such attempts. By finding that a particular definition would have been preferable to that actually given, ***Holland*** was viewed by many as ratifying the practice of submitting the superior definition. This occurred when ***Holland*** disapproved of an instruction couched in terms of a doubt "which you folks in the more serious and important affairs of your own lives might be willing to act upon," concluding instead that "this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act." ***Holland***, 348 U.S. at 140, 75 S.Ct., at 137. The Fifth Circuit pattern instruction is essentially an application of the ***Holland*** language, with the tense changed so that the instruction speaks as a direct command to the jurors.

For present purposes it is not necessary for this Court to establish jurisprudential order in place of this chaos. As in ***Holland***, *supra* and ***Moss***, *supra*, it is sufficient to determine whether a particular attempt at defining proof beyond a reasonable doubt was not correct. What the trial court did in this cause departed from the basic concept implicitly approved in ***Holland*** and adopted for the Fifth Circuit pattern instruction. That departure diluted the protection afforded by the pattern instruction in at least three ways.

First, contrary to the view expressed by the trial judge at the sentencing hearing (T. Sent.-11-12), it is common human experience to defer to the judgment of others in most human affairs, even those which are among the "most important." For example, employment, family relations, and religion are very important, but the average person generally is willing to allow others to act in such matters based on some level of confidence short of proof beyond a reasonable doubt that the other person is doing the right thing. It diminishes a juror's proper level of "hesitation" to imply that a guilty verdict is permissible even if a juror is convinced only to the same degree that would make him rely on his boss, his spouse, or his clergyman.[5]

Second, deference to others is, by its nature, an act rather than a hesitation to act, i.e. one acts by authorizing another person to take action. Therefore the real meaning conveyed by the trial court's instruction was the type of

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[5] The reference in the charge given to action by other persons did not contain any qualifying language that the other person be a "reasonable" person, which was considered important in *Noone*, *supra*. The petitioner does not concede that an average person never defers in important matters to action by others who are believed to be unreasonable, though that would be uncommon.

definition which was disapproved in ***Holland, supra***. As sugggested in ***Noone, supra*** at 29, n. 14, comparing the kind of doubt which would cause someone to act, rather than hesitate to act, produces an "impermissible shifting of the burden of proof."

Third, language referring to a level of confidence in other persons' behavior tended to diminish the importance of each juror's responsibility to make up his or her own mind. This is due in part to the language about other persons acting, since jury deliberation is an interactive process, and due in part to ambiguity in the charge language as to which person's "hesitation" was intended. Jury service is among a person's "most important" affairs, and a juror might interpret the instruction given here as meaning that reasonable doubt no longer exists if a juror perceives that other jurors are willing to act without hesitation in finding a defendant guilty. The judge's choice of words incorrectly implied that a juror in the minority should yield unless he believed his own doubt was so strong that it justified preventing the eleven other jurors from acting on their own beliefs about guilt.

The Court of Appeals declined to actually resolve the disagreement between the petitioner and the trial judge as to which version of the instruction was superior. The Court of Appeals believed the instruction given was close enough in concept. The differences, as set forth above, were essentially ignored. The Court of Appeals also reasoned, in footnote 3 of the opinion, that any harm was mitigated by other portions of the charge. The petitioner disagrees. The charge excerpts mentioned in footnote 3 of the Court of Appeals' opinion undoubtedly do emphasize that the Government had the burden of proving guilt beyond a reasonable doubt, but such repetition only served to aggravate the basic error in the altered definition. The petitioner presumably was not helped

by having the jury's attention repeatedly directed to an incorrect burden of proof standard.

C. REASONS FOR REVIEW OF QUESTION III: THE "SEEK THE TRUTH" INSTRUCTION

The Court of Appeals held that plain error was not shown in the submission of an instruction that the jurors' "only interest" was to "seek the truth from the evidence." This was based on the Pattern Instructions §1.25. The petitioner challenged the correctness of this language at the sentencing hearing, and the trial court was somewhat sympathetic to the argument (T.Sent.-12). The Court of Appeals found that the instruction was not plain error, but the reasoning was really to the effect that this instruction was not error at all. Relying on prior decisions in ***United States v. Cordova-Larios***, 907 F.2d 40 (5th Cir. 1990) and ***United States v. Winn***, 948 F.2d 145 (5th Cir. 1991), the Court of Appeals found that there was "nothing contradictory between the notions of truth-seeking and the duty to find guilt beyond a reasonable doubt." The petitioner disagrees. While such a conflict might not arise in every case, the risk is real that such a conflict could occur.

A literal "search for truth" is a characteristic of the inquisitorial concept of justice, but it is not part of the American adversarial system, where an issue for litigation is defined by law and pleadings and one party is assigned the burden of proving that issue. In an American criminal case the burden of proof as to all elements necessary for conviction is placed on the Government, and the accused is presumed innocent until the Government meets that burden of proving guilt beyond a reasonable doubt. If the Government fails to prove any element of its case beyond a reasonable doubt, that should end the jury's inquiry, regardless of what the "truth" may be.

The "seek the truth" instruction improperly injects into the jury's deliberations a risk of error which could be called the "Lazarus factor." Once jurors agreed that the evidence did not prove guilt beyond a reasonable doubt, the foreperson should sign the "not guilty" verdict form. A further assignment to "seek the truth" creates the risk that, even at that point, the Government's case could revive like Lazarus as jurors carried on with their deliberations to determine the "truth." The jurors might eventually conclude that they could not unanimously agree on any explanation for "the truth" other than the Government's hypothesis. The Government's case, moribund on its own terms, could be accepted simply because it seemed more plausible than anything else, given the evidence before the jury.

The Lazarus factor was not considered in ***Cordova-Larios***, *supra*, where the complaint in the trial court was that the §1.25 language was not embellished with additional "reasonable doubt" verbiage. In ***Winn***, *supra* at 160 it was erroneously argued that the "seek the truth" language was the final word, a contention belied by the record. ***Id.***, n. 38. ***Winn*** also cited ***United States v. Kimmel***, 777 F.2d 290, *cert. denied* 476 U.S. 1104 (1986), but a review of ***Kimmel*** itself reveals that Kimmel's complaint did not concern the "seek the truth" language.

The history of the "seek the truth" instruction indicates that its original intended use was in so-called "***Allen*** charges,"[6] i.e. instructions designed to motivate jurors toward reaching a verdict. This was where the language appeared in ***Kimmel***, *supra*. As far as the petitioner can determine, the "seek the truth" language first surfaced as one

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[6] This label derives from ***Allen v. United States***, 164 U.S. 492 (1896).

small portion of a lengthy verbal instruction given to jurors in a controversial treason trial. ***Tomoya Kawakita v. United States***, 190 F.2d 506, 522 (9th Cir. 1951). This Court affirmed that decision in ***Kawakita v. United States***, 343 U.S. 717 (1952). In neither this Court nor the Ninth Circuit was the suitability of the "seek the truth" language, as opposed to the larger ***Allen*** charge issue, specifically considered. The Sixth Circuit opined in ***United States v. Giacalone***, 588 F.2d 1158, 1166 (6th Cir. 1978) that this Court "implicitly approved" the ***Allen*** charge in ***Kawakita***, but the "seek the truth" language was never debated in ***Kawakita*** or in ***Giacalone***.

At this point it is useful to reflect on the purpose of an ***Allen*** charge. ***Allen*** charges are designed to be given when a jury deadlocks. In the full paragraph in ***Tomoya Kawakita***, *supra* at 522, n. 17, which contains the "seek the truth" language, reference to the jurors as "judges of the facts" was juxtaposed with an instruction that "you are not partisans." It presumably was intended to motivate jurors to review the evidence with the same neutrality and objectivity as the trial judge must have. In this spirit, the original intent of an instruction to "seek the truth" probably was nothing more than to help break logjams in deliberations, though its suitability for even doing that is debatable. Outside the ***Allen*** charge context, however, there is no interest in judicial economy sufficient to offset the mischief inherent in this language.

Other cases addressing complaints about "seek the truth" instructions have provided little analysis, with no attention to the Lazarus factor. ***United States v. Lynch***, 477 F.2d 924, 925 (6th Cir. 1973) reviewed the question in an ***Allen*** charge context and simply stated:

> Taking the Judge's charge and this statement in proper context, we find no reason to conclude that the jury would believe that the requirement of proof beyond a reasonable doubt had been eliminated.

This did not address the problem created if the jury believes that reasonable doubt exists but it nevertheless must uncover the truth. In ***United States v. LaRiche***, 549 F.2d 1088, 1093 (6th Cir. 1977), *cert. denied* 430 U.S. 987 (1977), the Sixth Circuit characterized LaRiche's argument as being that the instruction "somehow distorted the jury's function and diluted the Government's burden of proof." If "somehow distorted" was the best argument LaRiche could muster, it is no wonder he lost.

This Court has not specifically addressed the propriety of a "seek the truth" instruction. Considering the important principles potentially compromised by such an instruction, this Court should review the issue as plain error.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, petitioner prays that this Court grant his petition for writ of certiorari, order full briefs and oral argument, and reverse the judgement of the Court of Appeals.

Respectfully submitted

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APPENDIX A

U.S. COURT OF APPEALS
F I L E D
AUG 17 1993
RICHARD E WINDHORST,JR.
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2745
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

FRANCISCO MENDEZ-VILLARREAL,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-0033-02)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM: *

Francisco Mendez-Villarreal ("Mendez") appeals his drug-related convictions on the grounds that the district court improperly struck one venireman and improperly charged the jury in several particulars. Finding no error, we affirm.

Mendez was convicted by a jury of one count of possession, with intent to distribute, more than 100 kilograms of marihuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2, and one count of conspiracy to possess, with intent to distribute, more than 100 kilograms of marihuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2. While entertaining challenges for cause, the district court informed the attorneys as follows: "I don't know how you gentleman [sic] feel about this, but [venireman] Number 29, if her children have been taken away from her by the county I'm not sure I want her on my jury." Defense counsel initially responded, "Well, I didn't see any problem with it, I do on 30."

After a brief discussion concerning Number 30, the court reiterated that it was bothered by the fact that Number 29's children had been taken away by a government agency. The prosecutor then challenged her for cause on the ground that she might be prejudiced against the government.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Defense counsel not only failed to object but added, "She might hold it against me." The district court then struck Number 29 without objection.

Mendez now argues that the district court erred in suggesting and granting the government's challenge for cause regarding Number 29. According to Mendez, his right to be tried before a fair and impartial jury was compromised because the district court allowed an improper challenge for cause. Mendez asserts that this challenge amounted to an improper, "bonus" peremptory strike for the government.

Because Mendez failed to object at trial, we review only for plain error. *See* FED. R. CRIM. P. 52(b); *United States v. Pofahl*, 990 F.2d 1456, 1471 (5th Cir. 1993). Plain error is "error so obvious and substantial that failure to notice it would affect the fairness, integrity, or public reputation of [the] judicial proceedings and would result in manifest injustice." *Id.* (brackets in original) (citation and internal quotation marks omitted).

Attempting to circumvent the plain error standard and the burden of demonstrating actual prejudice that it places on the defendant, Mendez argues that the improper removal of a potential juror is *per se* harmful, citing *Davis v. Georgia*, 429 U.S. 122 (1976). *Davis* was a death penalty case, however, and in capital cases, the improper removal of a venireman for cause is scrutinized more closely "where removal is based on that person's opposition to the death penalty." *See United States v. Prati*, 861 F.2d 82, 87 n.16 (5th Cir. 1988).

Mendez further relies upon *United States v. Salamone*, 800 F.2d 1216 (3rd Cir. 1986), for the proposition that *Davis* extends to all criminal cases. In *Salamone*, a firearms case, the district court cursorily struck

every potential juror who was affiliated with the National Rifle Association. *Id.* at 1226-27. Relying upon *Davis's* "instructive" example, the Third Circuit reversed Salamone's conviction:

> [W]ere we faced with the inadequate questioning of a single excluded juror we might apply a different standard for determining the prejudicial effect of the erroneous exclusion. However, where such a "manifest abuse of discretion" results in the wholesale exclusion of a particular group, we do not deem it necessary for the defendant to affirmatively demonstrate the existence of actual prejudice in the resulting jury panel. Under such circumstances, prejudice may be presumed.

Id. at 1227.

We find *Salamone* distinguishable on its face. Here, there was no "wholesale exclusion of a particular group"; the district court excluded one potential juror only, and the defense counsel concurred in that exclusion. This case far more resembles "the inadequate questioning of a single excluded juror" that the *Salamone* court itself recognized as calling for a stricter standard. We therefore decline counsel's invitation to adopt *Salamone* under the particular facts of this case.

Rather, we find the instant case governed by *United States v. Prati*, 861 F.2d 82, 87 (5th Cir. 1988), where, similarly (accepting for the moment Mendez's version of the event), "[t]he effect of the court's error was to provide the government with an extra peremptory challenge." Noting the Supreme Court's conclusion that the distribution of

peremptory strikes does not rise to a constitutional level, *see Ross v. Oklahoma*, 487 U.S. 81, 88 (1988), we required some showing of prejudice to the defendant or partiality by the jury, even where the defendant had objected at trial to the government's challenge for cause of one prospective juror. *Prati*, 861 F.2d at 87.

Even were we to assume that the venireman's exclusion was error, Mendez has alleged no partiality by the jury that ultimately tried him. Nor can he assert prejudice convincingly, inasmuch as the jury panel was composed of veniremen Nos. 2-26, with the last two — Nos. 25 and 26 — seated as alternates. Even had the excluded juror not been struck, the jury would have been selected before she could have been reached.[1] In *Prati*, at least, "the improper removal of the venire member may have altered the ultimate composition of the panel," *id.*, and yet we affirmed. Here, in contrast, the court's action had no such effect, and, therefore, cannot constitute plain error.

II.

A.

Mendez argues that the district court committed three distinct errors in instructing the jury. Again, he failed to object to the charge at trial, and accordingly, we review for plain error only. *United States v. Stone*, 960 F.2d 426, 434 (5th Cir. 1992).[2] In so doing, we must consider the charge

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1. We note also that the government used only three of its allotted peremptory strikes in selecting the jury. The district court's action in effectively granting it a "bonus " strike, therefore, had no real effect on the selection process.

2. We cannot agree with Mendez that the airing of his objections to the charge at his sentencing hearing should be considered timely. FED. R. CRIM. P. 30 is quite plain, and provides in part, "No party may

as a whole and determine whether "it is so clearly erroneous that the result would be a grave miscarriage of justice or seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Winn*, 948 F.2d 145, 159-60 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1599 (1992). We also have stated that, in the context of jury instructions, plain error exists only if it "could have meant the difference between acquittal and conviction." *United States v. Contreras*, 950 F.2d 232, 240 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2276 (1992).

Mendez first argues that the district court erred in formulating his charge to the jury respecting the reasonable doubt standard: "Proof beyond a reasonable doubt is proof that is so convincing that you would be willing to have *other people* rely and act upon it without hesitation in the most important of your own affairs." (Emphasis added.) Mendez asserts that the court's instruction diverges crucially from the pattern jury instruction in that the latter requires "proof of such a convincing character that *you* would be willing to rely and act upon it without hesitation in the most important of your own affairs." (Emphasis added.) FIFTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS 17 (1990 ed.).

We begin with the premise that district courts possess substantial latitude in formulating jury instructions. *United States v. Carr*, 979 F.2d 51, 53-54 n.5 (5th Cir. 1992). Moreover, a challenged reasonable doubt instruction must be viewed in the particular context in which it is given. *Baker*

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assign as error any portion of the charge or omission therefrom unless that party objects thereto *before the jury retires to consider its verdict* . . . ." (Emphasis added.) As the jury long since had retired, and had been discharged, by the time Mendez's sentencing hearing was held, we have no choice but to proceed under the plain error standard of review.

v. United States, 412 F.2d 1069, 1073 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970). So long as the definition correctly conveys the concept of reasonable doubt, the charge will not be considered sufficiently prejudicial to warrant reversal. *Holland v. United States*, 348 U.S. 121, 140 (1954).

During the sentencing phase, the district court explained that, in its view, the variation from the pattern instruction served to raise the standard of proof — not lower it, as Mendez contends. We need not delve into the more metaphysical aspects of the criminal law, however, because we find not only that the altered instruction adequately conveyed the concept of reasonable doubt, but also that the district court amply cautioned the jury elsewhere in its charge. *See United States v. Moss*, 756 F.2d 329, 334 (4th Cir. 1985).[3]

B.

Mendez also failed to object at trial but asserts as error on appeal that the district court's charge relieved the

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3. Immediately after the challenged reasonable doubt instruction, for example, the court reminded the jury that "the defendant is innocent and he remains innocent unless the Government proves its charges." Later, the court reiterated,

> The defendant is presumed innocent. If a reasonable doubt remains in your minds after a fair consideration of all of the evidence, you must acquit the defendant, finding him not guilty. The Government has the duty to prove his guilt beyond a reasonable doubt, and if the Government fails you must acquit him.

Such cautions to the jury are, according to the Fourth Circuit, "precisely the type of ameliorating instructions that render harmless any confusion engendered by an unsuccessful attempt to define reasonable doubt." *Moss*, 756 F.2d at 334.

government of proving his culpable mental state. Item 19-D of the court's instructions to the jury provides, "A defendant must be found to have acted knowingly and willfully." According to Mendez, "there was a substantial risk that it could have been taken as a judicial command to find against the appellant on the *mens rea* element."

A verdict cannot stand if the instructions do not require the jury to find each element of the crime under the proper standard of proof. *United States v. Ojebode*, 957 F.2d 1218, 1227 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993). We previously have noted that "[a]ny one instruction, however, does not have meaning in isolation from the instructions that went before and came after it." *United States v. Jokel*, 969 F.2d 132, 136 (5th Cir. 1992).

In this case, the jury was instructed on many occasions that the government was required to prove all elements beyond a reasonable doubt and that Mendez was presumed innocent until the government met its burden of proof. *See, e.g.*, note 3, *supra*. Moreover, the court separately defined both "knowingly" and "willfully" and gave a deliberate ignorance instruction prior to the challenged charge.[4] Lastly, in its explanation of the government's

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4. The full text of the court's charge regarding the requirement of knowing and willing conduct is as follows:

> "Knowingly" means an act was done voluntarily and not because of mistake or accident.
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> "Willfully" means an act was done with a conscious purpose to violate the law.
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> A defendant can still be found to have acted knowingly or willfully if he closed his eyes on purpose to avoid learning all of the facts or the law.
>
> A defendant must be found to have acted knowingly and willfully.

burden under count one, the court instructed the jury that "the Government must prove beyond a reasonable doubt that the defendant knowingly and willfully possessed" the marihuana; as to count two, the court stated that "the Government must prove . . . the defendant willfully became a member of that conspiracy . . ." Viewed in this context, the challenged instruction could not have meant the difference between acquittal and conviction, and therefore, we find no plain error.

C.

Finally, Mendez argues that the district court erred in instructing the jury that "your only interest is to seek the truth from the evidence," following the FIFTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS 39. As in *United States v. Winn*, 948 F.2d at 159-60, however, the district court not only instructed the jury to "seek the truth," but also properly instructed the jury as to the burden of proof. We agree with the *Winn* court that, "in the face of the reiteration of the burden of proof (i.e. beyond a reasonable doubt) . . . one instruction to "seek the truth from the evidence" in no way rises to the level of a miscarriage of justice." *Id.* at 160. As we previously have stated, we find nothing contradictory between the notions of truth-seeking and the duty to find guilt beyond a reasonable doubt. *See United States v. Cordova-Larios*, 907 F.2d 40, 42 (5th Cir. 1990).

AFFIRMED.